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Supreme Court, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

RODNEY J. AHITOW,

Petitioner,

v.

JAMES P. GLASS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Seventh Circuit erroneously found that time which accrued before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 cannot be counted against that Act's statute of limitations, when the majority of the Circuits to have addressed the matter appear to hold to the contrary.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review that court's judgment and opinion entered on August 20, 1998.

OPINION BELOW

The August 20, 1998 *per curiam* decision of the United States Court of Appeals for the Seventh Circuit, which was consolidated with two unrelated cases under the name *Gendron v. United States*, is published at 154 F.3d 672 (7th Cir. 1998). This decision is reprinted in the appendix to this petition. The December 8, 1998 order of the Court of Appeals, denying Ahitow's Petition for Rehearing with Suggestions for Rehearing *En Banc*, apparently is unreported, and is reprinted in the appendix to this petition.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on August 20, 1998, and rehearing was denied on December 8, 1998. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The United States District Court for the Central District of Illinois asserted jurisdiction under 28 U.S.C. § 2254. The United States Court of Appeals for the Seventh Circuit asserted jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253.

Respondent, James P. Glass, had appealed from a final judgment of the United States District Court for the Central District of Illinois dismissing as time-barred Glass's petition for writ of *habeas corpus* brought pursuant to 28 U.S.C. § 2254. On October 17, 1991, Glass was convicted, following a jury trial in McLean County, Illinois, of three counts of aggravated criminal sexual assault and one count of aggravated criminal sexual abuse. Glass was sentenced to three consecutive terms of 25 years' imprisonment, and one concurrent term of seven years' imprisonment.[1] On December 28, 1992, Glass's conviction and sentence were affirmed on direct appeal by the Appellate Court of Illinois, Fourth Judicial District. *People v. Glass*, 239 Ill.App.3d 916, 606 N.E.2d 655 (4th Dist. 1992). Glass did not petition for leave to appeal to the Illinois Supreme Court from that decision.

On August 18, 1994, Glass filed a petition in the Circuit Court of McLean County, Illinois pursuant to the Illinois Post-Conviction Hearing Act, 725 ILCS 5/122-1 *et seq*. The petition was denied on September 20, 1994. Glass appealed, and on February 3, 1997, the

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[1] The United States District Court's Order appears to be in error in its indication that Glass received a concurrent term of 7½ years.

Illinois Appellate Court, Fourth Judicial District, affirmed the denial of post-conviction relief in an unpublished order pursuant to Illinois Supreme Court Rule 23. Glass then filed a petition for leave to appeal to the Illinois Supreme Court, which was denied on June 4, 1997.

Glass filed his federal petition for writ of *habeas corpus* with the United States District Court for the Central District of Illinois on January 12, 1998. On January 16, 1998, the District Court dismissed the petition as time-barred under the statute of limitations enacted under 28 U.S.C. § 2244(d). The court concluded that Glass's petition was untimely by counting against the statute's one year statute of limitations an 18-month period following the completion of Glass's direct appeal[2] but before Glass filed his post-conviction petition, plus another 7-month period between the June 4, 1997 denial of leave to appeal on his post-conviction appeal and the January 12, 1998 filing of his federal *habeas* petition.[3] The court concluded that the 25-month total exceeded the one year statute of limitations, and

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[2] The court found that the clock started running following January 27, 1993, the date which the District Court concluded would be the last date for Glass to seek leave to appeal. Actually, the District Court may have been too generous in this respect, since, under Illinois Supreme Court Rule 315(b), Glass would have had to commit to seeking leave to appeal within 21 days of the decision to avoid losing his right to seek leave.

[3] As for the period between the August 18, 1994 filing of the post-conviction petition in the circuit court and the June 4, 1997 Illinois Supreme Court denial of leave to appeal following the appellate court's affirmance of the denial of post-conviction relief, the District Court found that the clock had been stopped pursuant to 28 U.S.C. § 2244(d)(2).

accordingly dismissed the petition. Glass initiated an appeal, then filed an application for a certificate of appealability, which the District Court denied on February 23, 1998.

Before any grant of a certificate of appealability or the setting of a briefing schedule, Glass filed a brief in the United States Court of Appeals for the Seventh Circuit. Then, without allowing for any briefing by Ahitow, the Court of Appeals entered its *per curiam* decision on August 20, 1998. It granted a certificate of appealability, and held that, in light of this Court's decision in *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 2068 (1997), the statute of limitations enacted at 28 U.S.C. § 2244(d) as part of the Antiterrorism and Death Penalty Act of 1996 (AEDPA) did not begin to run until April 24, 1996, the date of the enactment of the AEDPA. The court found that the District Court had erred in counting against the provision's one-year statute of limitations any time which may have accrued before April 24, 1996. Then, finding that the period during which post-conviction proceedings and the appeal therefrom tolled the running of the limitations period, the Court concluded that Glass's *habeas* petition was timely filed, and remanded for consideration of the merits of the petition.

Ahitow timely filed a Petition for Rehearing with Suggestion for Rehearing *En Banc*. The Court of Appeals ordered that counsel for Glass respond. Not having counsel, Glass then requested that counsel be appointed to file the response. The Court of Appeals appointed counsel, who filed an Answer to the Petition for Rehearing. On December 8, 1998, the Court of Appeals denied Ahitow's Petition for Rehearing. Thereafter, on Decem-

ber 23, 1998, on Ahitow's motion, the Court of Appeals stayed its mandate pending the petition for writ of certiorari.

Petitioner, Rodney J. Ahitow, now seeks a writ of certiorari from this Court to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted Because The Court Of Appeals Erred In Finding That Time Accrued Before The Enactment Of The Antiterrorism And Effective Death Penalty Act Of 1996 Cannot Be Counted Against That Act's Statute Of Limitations When The Majority Of The Circuits To Have Addressed The Matter Appear To Hold To The Contrary.

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA). As part of that Act, Congress included for the first time a statute of limitations governing federal *habeas corpus* actions. Relevant here are the following portions of the Act's provisions regarding the statute of limitations:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a State court. The limitation period shall run from the latest of—
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> * * *

> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. §§ 2244(d)(1)(A), 2244(d)(2).

Respondent James Glass's state court conviction was affirmed on direct appeal on December 28, 1992, and the time for Glass to seek leave to appeal to the Illinois Supreme Court was, at most, 35 days thereafter, or February 1, 1993. *See* Illinois Supreme Court Rule 315(b). Glass did not seek leave to appeal. Approximately eighteen months passed, and on August 18, 1994, Glass filed a petition challenging his conviction under the Illinois Post-Conviction Hearing Act, 725 ILCS 5/122-1 *et seq*. That petition, and the appeal from the denial of that petition lasted from August 18, 1994 through June 4, 1997. Thereafter, Glass filed his federal *habeas corpus* petition on January 12, 1998.

The United States District Court dismissed the petition as time-barred, concluding that the 18-month period between the direct appeal and the filing of the post-conviction petition, plus the seven-month period between the end of post-conviction review and the filing of the federal *habeas* petition counted against Glass for purposes of the one-year statute of limitations. The Court of Appeals reversed, holding that the earlier 18-month period could not be counted for statute of limitations purposes because it predated the enactment of the AEDPA. The notion that time accrued before the enactment of the AEDPA cannot be counted with respect to the statute of limitations adopted in that Act is

clearly erroneous, and in contravention of how the majority of the Circuit Courts of Appeal which have dealt with the issue, including the Seventh Circuit before its decision in this case, have interpreted the AEDPA's statute of limitations.

In support of its decision, the Court of Appeals purported to rely on this Court's decision in *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059 (1997), finding as follows:

> In *Lindh v. Murphy*, ___ U.S. ___, ___, 117 S.Ct. 2059, 2068, 138 L.Ed.2d 481 (1997), the Supreme Court concluded that Congress intend [*sic*] for most of the AEDPA provisions to apply only to cases filed after April 24, 1996. We agree with the Tenth Circuit that this holding extends to the period of limitations contained in § 2244. See *Hoggro v. Boone*, 150 F.3d 1223, 1224 (1998). Thus, for § 2254 petitions the period of limitations does not begin to run until April 24, 1996, the AEDPA's enactment date. *See id.* Consequently, the district court incorrectly counted the period between the conclusion of Glass's direct review in 1993 and the commencement of post-conviction proceedings in 1994. Because Glass had a properly filed postconviction [sic] petition when the AEDPA was enacted, his period of limitations tolled at least until June 4, 1997, when the Illinois Supreme Court denied leave to appeal. Accordingly, Glass's § 2254 petition, filed on January 12, 1998, was timely.

Gendron v. United States, 154 F.3d 672, 675 (7th Cir. 1998). This analysis is most problematic.

The court's attempt to find support for its position in *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 2068

(1997), is entirely misplaced. *Lindh* indeed held that "the new provisions of chapter 153 generally apply only to *cases* filed after the Act became effective." (117 S.Ct. at 2068; emphasis added). However, Petitioner Glass's habeas petition *is* a case filed after the effective date of the AEDPA, so the application of the provisions of the Act to Mr. Glass's petition cannot be deemed barred by *Lindh*. While *Lindh* barred application of the new provisions of the AEDPA to "cases" filed before the enactment of the AEDPA, it did not bar application of those new provisions to mere "events" which preceded enactment of the AEDPA. In the case at bar, the District Court applied the new provisions to mere "events" preceding enactment of the AEDPA when it counted against Glass the approximately one and one-half years between the completion of his direct appeal and the filing of his post-conviction petition. As will be shown, *infra*, the district court cannot be faulted for having done so.

With respect to *Hoggro v. Boone*, 150 F.3d 1223 (10th Cir. 1998), Ahitow cannot deny that the Tenth Circuit there held that the statute of limitations began to run with the April 24, 1996 enactment of the AEDPA. But, contrary to the view of the Court of Appeals in this case, the *Hoggro* court did not purport to rely on this Court's *Lindh* decision to support that finding. Rather, it purported to rely on, *inter alia*, the Seventh Circuit's own decision in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (*en banc*), which it cited as having been reversed on other grounds by this Court.

But the Seventh Circuit's decision in *Lindh* actually undercuts the decisions in both *Hoggro* and the case at bar. In *Lindh*, the Seventh Circuit Court of Appeals

essentially adopted a one-year "grace period" for the filing of habeas petitions so that those whose judgments already had been final for a year when the AEDPA was enacted would not be precluded from seeking the writ. Had the "period of limitations" provided for in 28 U.S.C. § 2244(d)(1)(A) been deemed to begin on April 24, 1996, there would have been no need for the Seventh Circuit, and the other courts which followed suit, to have adopted a grace period at all. *See Burns v. Morton,* 134 F.3d 109 (3rd Cir. 1998); *United States v. Flores*, 135 F.3d 1000 (5th Cir. 1998); *Brown v. Angelone*, 150 F.3d 370 (4th Cir. 1998); *Calderon v. United States District Court for the Central District of California*, 128 F.3d 1283 (9th Cir. 1997); *Ross v. Artuz*, 150 F.3d 97 (2nd Cir. 1998); *see also, United States v. Simmonds*, 111 F.3d 737 (10th Cir. 1997).[4] The actual language of the provision, which speaks of "the date on which judgment became final by the conclusion of direct review or the expiration of the time for seeking such review," appears inconsistent with any notion that it was intended to cover only future judgments.

The Seventh Circuit's determination that the period of limitations did not begin to run until April 24, 1996, is inconsistent with at least two other decisions by panels of that same court. In *O'Connor v. United States*, 133 F.3d 548 (7th Cir. 1998), a case decided after this Court's decision in *Lindh*, a panel of the Seventh Circuit addressed the appeal of a petitioner under 28

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[4] The finding, in *Hoggro*, that the statute of limitations of the AEDPA did not begin to run until the AEDPA's April 24, 1996 enactment, appears inconsistent with that same court's views in *Simmonds*.

U.S.C. § 2255. When O'Connor filed his petition, he had pending another proceeding which might upset the conviction under consideration, and the district judge remarked that only extraordinary circumstances justify entertaining a collateral attack given the pendency of such another proceeding. In response, O'Connor argued that such a circumstance was presented by the fact that there were only six days to go before the first anniversary of the AEDPA, a position the *O'Connor* panel appears to have found persuasive. The panel stated:

> That anniversary was significant for three reasons: first the AEDPA added a one-year statute of limitations for commencing collateral attacks under 28 U.S.C. § 2255 ¶ 6; second, post-judgment motions (such as those under Rules 32, 33, and 35) do not suspend the period, so O'Connor *had accumulated one year of "countable" time even before the AEDPA's enactment*; but, third, we stated in *Lindh v. Murphy*, 96 F.3d 856, 866 (7th Cir. 1996) (en banc), reversed on other grounds, ___ U.S. ___, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), that "no collateral attack filed by April 23, 1997, may be dismissed under § 2244(d) and the parallel provision added to 28 U.S.C. § 2255 by § 105 of the 1996 Act." O'Connor got his petition in under the wire. *Young v. United States*, 124 F.3d 794, 795-96 (7th Cir. 1997), holds that this aspect of *Lindh* is unaffected by the Supreme Court's conclusion that the AEDPA's amendments to §§ 2244-55 do not apply to cases filed before April 24, 1996. So O'Connor's petition on April 17, 1997 was timely. Had he waited a few days longer it would have been too late. 133 F.3d at 550 (emphasis added).

Given the emphasized language and the reference to the earlier holding in *Young v. United States* in the foregoing quotation, it is clear that the Seventh Circuit either impliedly (*Lindh*) or expressly (*O'Connor*) had found that time which accrued before the enactment of the AEDPA could be counted in determining the timeliness of a habeas petition.

Ahitow maintains that the proper analysis of the issue is found in such cases as *Brown v. Angelone, supra, and United States v. Flores, supra.* In those cases, the courts recognized that limitation periods are procedural in nature, and therefore "[c]ourts normally apply the statute of limitations in operation at the filing of the suit even if enacted subsequent to the conduct giving rise to the suit, effectively shortening the period available for a plaintiff to file." *Brown*, 150 F.3d at 373; *see also*, *Flores*, 135 F.3d at 1003-1004. At the same time, both courts, acknowledging such precedents as *Wilson v. Iseminger*, 185 U.S. 55, 22 S.Ct. 573 (1902), recognized that a newly enacted shortened limitations period could not be retroactively applied in such a manner as to extinguish a litigant's cause of action. The courts therefore held that a grace period, in each instance, one year, would be necessary to accommodate federal *habeas* petitioners who otherwise would be time-barred under the AEDPA's statute of limitations. *Brown*, 150 F.3d at 373-374; *Flores*, 135 F.3d at 1004-1006. In its earlier decision in *Lindh*, the Seventh Circuit had reached a like conclusion. However, in the case at bar, the Seventh Circuit essentially abandoned that formulation. Apparently it did so because, under it, Glass apparently would be time-barred, since he had lost more than a year before the enactment of the

AEDPA and did not file his federal *habeas* petition within a year of the enactment of the AEDPA. Even assuming that Glass' right to seek *habeas* relief would thereby have been extinguished, there is no reasoned basis for the Seventh Circuit's departure from its earlier holdings that time which accrued before the enactment of the AEDPA counted against the statute of limitations.

This leads to consideration of Mr. Glass's case. Since, under § 2244(d)(1)(A), his one-year period in which to seek habeas relief would have ended in January, 1994, before enactment of the AEDPA, he arguably was in need of the one-year grace period recognized in the Seventh Circuit *Lindh* decision in order to file a timely *habeas* petition. Glass did not file his habeas petition by that April 23, 1997 grace period date. However, that need not be the end of the inquiry in Mr. Glass's case. This is so because, for the entirety of the grace period year recognized in *Lindh*, Glass had post-conviction proceedings pending in the state courts.[5] Given that the exhaustion requirement of 28 U.S.C. § 2254(b)(1)(A) remained unchanged by the amendments in the AEDPA, Glass might legitimately have believed that he needed to exhaust in the state courts claims he intended to raise on federal *habeas* before he could file his *habeas* petition, and thus would have missed the one-year grace period recognized in *Lindh*. On the other hand,

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[5] If, as Ahitow contends, the limitations period began running at the end of Glass's direct appeal, then 28 U.S.C. § 2244(d)(2) cannot be used, as the district court and the Court of Appeals in this case used it, to have "tolled" the period of limitations. The period of limitations technically had run even before enactment of the AEDPA.

one whose year had run before enactment of the AEDPA might have believed that April 23, 1997 was the last possible date to file a habeas petition, and thus would have filed by that date a habeas petition to insure the availability of the remedy, notwithstanding the pendency of state court proceedings. See, *Parisi v. Cooper*, 961 F.Supp. 1247 (N.D. Ill. 1997).

To the extent that Glass needed to use the ongoing state post-conviction proceedings to exhaust a claim which is also raised in his federal habeas petition and Glass thereby used the entirety of the grace period recognized in *Lindh*, perhaps the recognition of an extended grace period would be warranted. On the other hand, to the extent that all of Glass's federal claims were already exhausted before the state post-conviction proceedings, there appears no reason that Glass should not have been bound by the one-year grace period recognized in *Lindh*. Since Ahitow had no input in this case in either the District Court or in the Court of Appeals before rehearing, it does not appear that the Court of Appeals was in a position to know which was the case. But, its conclusion that the statute of limitations did not begin to run until the enactment of the AEDPA is clearly erroneous, and *certiorari* should be granted to address this issue of first impression and to correct that error. Thereafter, a more thorough record might be developed to allow the lower courts to determine whether or not to recognize an additional grace period with respect to Glass' *habeas* petition.

One might assert that Ahitow's argument for recognizing an extended grace period in certain instances, instead of recognizing April 24, 1996 as the beginning

of the limitations period under the AEDPA, is merely semantic. Ahitow denies that such is the case. Ahitow can envision various scenarios where unfair results would ensue by recognizing the latter concept instead of the former. For example, assume a *habeas* petitioner who, six months after his direct appeal is final, first files a post-conviction petition which pends in the state courts through the entirety of the grace period recognized in *Lindh*. Under the limitations period formulation recognized by the Seventh Circuit in *O'Connor* and *Lindh*, since the one-year limitations period began on completion of the direct appeal, and the period was then tolled during the post-conviction proceedings, the *habeas* petitioner would have six months after completion of the post-conviction proceedings in which to file his federal *habeas* petition. Under the limitations period formulation espoused by Court of Appeals in this case, however, the same petitioner would have an entire year after the end of the post-conviction proceedings to file a federal *habeas* petition because the one-year limitations period had not even begun to run until April 24, 1996.

Lest such obvious inequities occur, *certiorari* should be granted to interpret the statute of limitations found in the AEDPA, and to give guidance to *habeas* litigants and the federal courts alike.

CONCLUSION

For the aforementioned reasons, Petitioner, Rodney J. Ahitow, respectfully requests that this Honorable Court grant *Certiorari*, reverse the decision of the Court of Appeals, and remand for further proceedings.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 98-1233, 98-1291 & 98-1468

RANDALL GENDRON,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 97-CV-4312-JPG—**J. Phil Gilbert**, *Chief Judge.*

RANDALL GENDRON,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 97-CV-4312-JPG—**J. Phil Gilbert**, *Chief Judge.*

JAMES P. GLASS,

Petitioner-Appellant,

v.

RODNEY J. AHITOW,

Respondent-Appellee.

Appeal from the United States District Court
for the Central District of Illinois.
No. 98-1003—**Michael M. Mihm**, *Chief Judge*.

SUBMITTED JULY 30, 1998—DECIDED AUGUST 20, 1998

Before FLAUM, KANNE, and EVANS, *Circuit Judges*.

PER CURIUM. Prior to the Antiterrorism and Effective Death Penalty Act (AEDPA), a prisoner possessed virtually unlimited amounts of time to file a first petition for collateral review under 28 U.S.C. §§ 2254 and 2255. In an attempt to curb the protracted nature of such litigation, Congress established a one-year period of limitations. *See* 28 U.S.C. §§ 2244(d), 2255. We have consolidated for consideration and decision three appeals in order to clarify how district courts are to apply the new periods of limitation.

Randall Gendron's appeals, Nos. 98-1233 and 98-1291, arose from the following facts. On November 8, 1995, a jury in federal district court convicted Gendron of conspiracy to distribute and to possess with intent to distribute cocaine. Gendron's conviction and sentence were affirmed by this court on October 8, 1996. On October 21, 1996, Gendron filed a petition for rehearing, which this court denied on October 25, 1996. Subsequently, on November 4, 1996, this court issued the mandate. Gendron never filed a petition for certiorari with the United States Supreme Court, and he waited until November 18, 1997, to file his § 2255 motion to vacate.

The district court determined "the date that the mandate is returned from the Court of Appeals is the latest possible date that the prisoner's conviction would become final." Accordingly, the district court used the November 4, 1996 date as the starting point for the one-year limitations period. Because Gendron's motion to vacate was not mailed until November 18, 1997, the district court concluded that

the period of limitations had run; thus, the court denied the petition and dismissed the action with prejudice.

Gendron argues that even though he elected not to file a petition for certiorari with the Supreme Court, the district court should have excluded from the limitations period the 90 days he had to file such a petition. *See* Sup. Ct. R. 13. According to Gendron, the period of limitations should start to run, not from the date our mandate was issued, but on the date that review by the Supreme Court was precluded. *See id.* at 13.1, 13.3. Therefore, Gendron insists, he had until January 25, 1998, to file his § 2255 motion. *See id.* at 13.3. Because his motion was received by the district court on November 19, 1997, Gendron argues that his petition was timely filed.

In relevant part, the AEDPA amended § 2255 by adding the following language:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
>
> > (1) the date on which the judgment of conviction becomes final; . . .

We are left with the question of when a judgment is to be considered final. The Supreme Court has addressed the question of finality in the context of retroactivity. The Court defined a conviction as being final when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Griffith v. Kentucky*, 479 U.S. 314, 321 n. 6 (1987) (citing *United States v. Johnson*, 457 U.S. 537, 542 n. 8 (1982)). But, while the Court's definition can be used for guidance, Congress has the authority to independently determine the standards to be applied under §§ 2244 and 2255. *See Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) ("[W]e start with the assumption that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law."). In this regard, it is helpful to com-

pare the two periods of limitation contained in §§ 2244(d) and 2255.

As stated above, the period of limitations for § 2255 runs from "the date on which the judgment of conviction becomes final." 28 U.S.C. § 2255. In comparison, the period of limitations for petitions filed under § 2254 begins to run from "the date on which the judgment became final by the conclusion of direct review *or the expiration of time for seeking such review*[.]" 28 U.S.C. § 2244(d)(1)(A) (emphasis added). Thus, in drafting § 2244, Congress explicitly included the time for seeking leave to appeal with a state supreme court even if the petitioner elected not to do so.[1] Such additional language is lacking in § 2255.

Where Congress includes particular language in one section of an act but omits it in another section of the same act, it is presumed that Congress intended to exclude the language, and the language will not be implied where it has been excluded. *See Hohn v. United States*, 118 S. Ct. 1969, 1977 (1998) (citations omitted); *McNutt v. The Board of Trustees of the Univ. of Ill.*, 141 F.3d 706, 709 (1998) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)). In § 2244, Congress expressly included the period for seeking review whether or not a petitioner elected to avail himself of the opportunity. Because similar language is absent in § 2255, we conclude that Congress intended to treat the period of limitations differently under the two sections. Accordingly, we hold that federal prisoners who decide not to seek certiorari with the Supreme Court will have the period of limitations begin to run on the date this court issues the mandate in their direct criminal appeal. Any other reading of the statutes would render the additional language in § 2244 meaningless, a result we must avoid. *See Hohn*, 118 S. Ct. at 1976 ("We are reluctant to adopt

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[1] We leave open the question of whether § 2244's "direct review" includes the time a state prisoner, who files for leave to appeal to a state supreme court, is given to seek certiorari with the United States Supreme Court.

a construction making another statutory provision superfluous.") (citations omitted). The district court correctly dismissed Gendron's § 2255 motion as untimely, and we, therefore, decline to issue a certificate of appealability.

One additional matter raised by Gendron, in appeal No. 98-1291, is the district court's denial of his motion for reconsideration under Federal Rule of Civil Procedure 59(e). We review such a decision for abuse of discretion. *See Britton v. Swift Trans. Co.*, 127 F.3d 616, 618 (7th Cir. 1997). A Rule 59(e) motion may only be granted if there has been a mistake of law or fact or if there is newly discovered evidence not previously available. *See Figgie Int'l, Inc. v. Miller*, 966 F.2d 1178, 1180 (7th Cir. 1992). As the district court correctly applied the period of limitations, he did not abuse his discretion in denying Gendron's Rule 59(e) motion.

We turn now to the third consolidated case. In No. 98-1468, James Glass was convicted of three counts of aggravated sexual assault and one count of aggravated sexual abuse. Glass appealed to the Illinois Appellate Court, which affirmed his conviction and sentence on December 28, 1992. There is no indication that Glass ever sought leave to appeal his conviction to the Illinois Supreme Court. Thus, Glass's direct appeal ended on January 27, 1993, when his time to petition for leave to appeal to the Illinois Supreme Court expired.[2] *See* 28 U.S.C. § 2244(d)(1)(A); Il. St. S. Ct. R. 606(b).

On August 18, 1994, approximately a year and a half later, Glass collaterally attacked his sentence and conviction through a properly filed post-conviction petition in the Illinois trial court. On September 20, 1994, his petition

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[2] We reiterate that we do not address the question of whether a prisoner who filed for leave to appeal to the state supreme court would have the time for filing certiorari with the United States Supreme Court included in his "direct review" for the purposes of § 2244.

was denied. Glass appealed this determination, and on February 3, 1997, the Illinois Appellate Court affirmed the denial. Glass then filed for leave to appeal to the Illinois Supreme Court which was denied on June 4, 1997. On January 12, 1998, Glass filed his present habeas petition pursuant to § 2254.

Here too, the district court determined that Glass filed his petition after the period of limitations expired and dismissed the petition. In concluding that Glass had waited more than one year before filing his § 2254 habeas petition, the district court counted not only the 7-month period between the conclusion of his post-conviction proceedings[3] and the filing of his federal habeas petition, but also the 18-month period between the conclusion of Glass's direct review in 1993 and the filing of his state post-conviction proceedings in 1994. According to the district court, Glass had waited 25 months to file his § 2254 petition.

In *Lindh v. Murphy*, 117 S. Ct. 2059, 2068 (1997), the Supreme Court concluded that Congress intend for most of the AEDPA provisions to apply only to cases filed after April 24, 1996. We agree with the Tenth Circuit that this holding extends to the period of limitations contained in § 2244. *See Hoggro v. Boone*, No. 97-6383, 1998 WL 419727, at *3 (10th Cir. June 24, 1998). Thus, for § 2254 petitions the period of limitations does not begin to run until April 24, 1996, the AEDPA's enactment date. *See id.* Consequently, the district court incorrectly counted the period between the conclusion of Glass's direct review in 1993 and the commencement of post-conviction proceedings in 1994. Because Glass had a properly filed post-conviction petition when the AEDPA was enacted, his period of limitations tolled at least until June 4, 1997,

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[3] The district court correctly concluded that the period of limitations tolled while Glass's properly filed post-conviction proceedings were under consideration. *See* 28 U.S.C. § 2244(d)(2).

when the Illinois Supreme Court denied leave to appeal.[4] Accordingly, Glass's § 2254 petition, filed on January 12, 1998, was timely. We grant Glass's request for a certificate of appealability and vacate the district court's dismissal of the petition. This case is remanded for consideration of the merits of Glass's petition.

In summary, in appeals Nos. 98-1233 and 98-1291, we find that Gendron did not make a substantial showing of the denial of a constitutional right and DENY his request for a certificate of appealability. *See* 28 U.S.C. § 2253(c)(2). In appeal No. 98-1468, we GRANT Glass's request for a certificate of appealability under 28 U.S.C. §§ 2253(c)(1)(A) & (c)(2), VACATE the dismissal of his habeas corpus petition, and REMAND the case for further proceedings.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

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[4] In his application for a certificate of appealability, Glass first raised to the district court the claim that he pursued a writ of certiorari with the United States Supreme Court following the denial of his state post-conviction petition, which he claimed was denied on October 1, 1997. Actually, it was denied on October 6, 1997. *See Glass v. Illinois*, 118 S. Ct. 228 (1997). Whether we use June 4, 1997, or October 6, 1997, Glass's petition was timely.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Submitted September 4, 1998
Decided December 8, 1998

Before

Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*
Hon. TERENCE T. EVANS, *Circuit Judge*

No. 98-1468

JAMES P. GLASS,

Petitioner/Appellant,

v.

RODNEY J. AHITOW,

Respondent/Appellee.

Appeal from the United States District Court
for the Central District of Illinois.
No. 98-1003—Michael M. Mihm, Chief Judge.

ORDER

Respondent's Petition for Rehearing with Suggestion for Rehearing Enbanc is **Denied**.

[Entered January 16, 1998]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

JAMES P. GLASS, Petitioner,	)	
v.	)	Case No. 98-1003
RODNEY J. AHITOW, Warden, Respondent.	)	

ORDER

This matter is before the Court on James P. Glass' ("Glass") Motion to Proceed In Forma Pauperis, Motion for Appointment of Counsel, and Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. For the reasons set forth below, Petitioner's Motion to Proceed In Forma Pauperis [#1] is DENIED, the Motion for Appointment of Counsel [#2] is DENIED, and the Petition for Writ of Habeas Corpus [#3] is DISMISSED.

Background

Glass is currently in the custody of Respondent, Rodney Ahitow, Warden of the Illinois River Correctional Center in Canton, Illinois. On October 17, 1991, Glass was convicted on three counts of aggravated sexual assault and one count of aggravated sexual abuse. He was sentenced to three consecutive terms of 25 years and one concurrent term of 7 1/2 years.

Glass appealed to the Illinois Appellate Court, Fourth District, which affirmed his conviction and sentence on December 28, 1992. There is no indication that he ever filed for leave to appeal to the Illinois Supreme Court on his direct appeal.[1] Thus, Glass' direct appeal of his conviction appears to have terminated on January 27, 1993 when his time to petition for leave to appeal to the Illinois Supreme Court expired.

On August 18, 1994, more than a year and a half later, Glass initiated an attempt to collaterally attack his sentence and conviction through a post-conviction petition pursuant to 725 ILCS 5/122-1 in the Circuit Court of the Eleventh Judicial Circuit, McLean County. On September 20, 1994, his petition was denied. Glass appealed this determination, and on February 3, 1997, the Illinois Appellate Court, Fourth District, affirmed the trial court's determination. Glass then filed a petition for leave to appeal to the Illinois Supreme Court which was denied on June 4, 1997.

Petitioner filed the instant action on January 12, 1998. This Order follows.

Discussion

There are statutory time limits which govern whether a district court can entertain a petition for writ of habeas corpus. The present case is covered by 28 U.S.C. §2244, which states in relevant part:

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[1] Upon inquiry to the Clerk of the Illinois Supreme Court, the Court was informed that Glass had filed no petition for leave to appeal from the appellate court's affirmance of his conviction and sentence.

> A 1 year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right was newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review;
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. §2244(d)(1). The time during which a properly filed application for post-conviction or other collateral review is pending in the state courts is not counted toward any period of limitation. 28 U.S.C. §2244(d)(2).

In the present case, Glass alleges that he is entitled to relief because of ineffective assistance of counsel, unfitness to stand trial, denial of reasonable access to the courts, and suppression of favorable evidence by the prosecution. He makes no assertion that he was unable to discover his claims, that there is any newly recognized constitutional right, or that he was prevented from filing. Thus, this case does not involve the application of sub-sections (B), (C), or (D) above.

In the present case, Glass' direct attack on his conviction ended on January 27, 1993. He then waited until August 18, 1994 to file his petition for post-conviction relief in state court, which was more than 18 months after his direct attack was final. This filing stopped the clock from running until his petition for leave to file an appeal with the Illinois Supreme Court was denied on June 4, 1997. At this point, the clock once again began to tick. Glass' filing of his present petition did not occur until January 12, 1998, seven months after his state collateral attack was ultimately terminated.

In other words, this 7-month period plus the earlier 18-month period between the conclusion of his direct appeal and the filing of his post-conviction petition in the state courts exceeds the statutorily prescribed 1-year period of limitations after which a federal court cannot entertain a petition brought pursuant to §2254 by a prisoner in state custody.

Conclusion

Accordingly, Glass' Motion to Proceed in Forma Pauperis [#1] is DENIED, his Motion for Appointment of Counsel [#2] is DENIED, and his Petition for Writ of Habeas Corpus pursuant to §2254 [#3] is DISMISSED. This matter is now terminated.

ENTERED this 16th day of January, 1998.

Supreme Court, U.S.
FILED
APR 14 1999
CLERK

No. 98-1456

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

RODNEY J. AHITOW,

Petitioner,

v.

JAMES P. GLASS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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STATEMENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Respondent James P. Glass, by his counsel Barry Levenstam, Kendra Collier, and Jenner & Block, respectfully suggests that this Court deny the Petition for Writ of Certiorari for Case No. 98-1456. Contrary to the State's contention, the Seventh Circuit's decision regarding Mr. Glass in the consolidated case of *Gendron v. United States*, 154 F.3d 672 (7th Cir. 1998), concerning the statute of limitations set forth in 28 U.S.C. § 2244(d) is *not* "clearly erroneous, and in contravention of how the majority of the Circuit Courts of Appeal . . . including the Seventh Circuit," have interpreted the statute of limitations. (Ptn. 7.) Rather, the decision below is consistent with the decisions of other courts of appeals and does not conflict with other Seventh Circuit decisions. The Seventh Circuit's holding provides clear guidance for fairly applying the statute of limitations that Congress imposed upon habeas corpus petitions under 28 U.S.C. § 2254 -- rather than resorting to a judicially created "grace period." Furthermore, the court's holding is in complete accord with this Court's decision in *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059 (1997). This case therefore would present no basis for this Court's review even if the underlying issue weren't one that is bound by its very nature to disappear completely in very short order due solely to the passage of time.

ARGUMENTS FOR DENYING THE WRIT

Chapter 153 of the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA") applies to this case because Mr. Glass filed his 28 U.S.C. § 2254 habeas petition

after April 24, 1996, the effective date of the AEDPA. *See Lindh v. Murphy*, 117 S. Ct. at 2068 (holding that the new provisions of chapter 153 generally apply only to cases filed after the Act became effective). The Seventh Circuit's reliance upon this Court's decision in *Lindh* is not misplaced, as the State claims. *Lindh* held that Congressional intent dictates that the new provisions of the AEDPA do not apply to pending cases, but only to those cases filed after the Act became effective. *See* 117 S. Ct. at 2064-66. The Seventh Circuit's "conclu[sion] that Congress intend[ed] for most of the AEDPA provisions to apply only to cases filed after April 24, 1996," *Gendron*, 154 F.3d at 675, including the statute of limitations in Section 2244, is thus perfectly consistent with, and supported by, this Court's decision in *Lindh*.

This Court did not expressly state in *Lindh* when the Section 2244(d) statute of limitations should commence to run for petitioners whose convictions became final before Congress enacted the AEDPA. It is not inconsistent, therefore, for the Seventh Circuit to conclude that the one year limitations period set forth in 28 U.S.C. § 2244(d) begins to run on the date of the AEDPA's enactment. Certainly nothing in this Court's *Lindh* decision suggests that the Seventh Circuit's application of Section 2244(d) is in error. If anything, this Court's decision that the new provisions of the AEDPA should apply prospectively strongly suggests that it would *not* read Section 2244(d) to shorten a prospective petitioner's time for filing a habeas corpus petition by the period of time that expired from the time the prospective petitioner's judgment of conviction became final to the date the AEDPA became effective.

Indeed, the Seventh Circuit's conclusion is consistent with its own *en banc* ruling in *Lindh*, prior to this Court's decision. Specifically, the *en banc* Seventh Circuit stated:

> [A]lthough no decision of the Supreme Court addresses the question directly, we do not doubt that the Court would give a plaintiff who files after the enactment a reasonable post-amendment time to get litigation underway.

Lindh v. Murphy, 96 F.3d 856, 866 (7th Cir. 1996) (*en banc*), *reversed on other grounds*, 117 S. Ct. 2059 (1997). At that time the Seventh Circuit correctly recognized the utility of the statute's one-year period, and essentially adopted it despite mistakenly concluding that the courts otherwise should apply the AEDPA retroactively:

> Section 2244(d) is short enough that the 'reasonable time' after April 24, 1996, and the one-year statutory period coalesce; reliance interests lead us to conclude that no collateral attack filed by April 23, 1997, may be dismissed under § 2244(d).

Id. The very fact that this Court took no issue with the Seventh Circuit's prognostication on this point when subsequently reviewing that court's decision in *Lindh* lends considerable support to that aspect of the *en banc* opinion.

The State argues that the "reasonable time" language in the Seventh Circuit's *Lindh* opinion, which some lower courts have termed a "grace period,"[1/] undercuts, and is inconsistent with,

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1/ *See, e.g., United States ex rel. Starks v. O'Sullivan*, No. 97 C 3246, 1998 U.S. Dist. LEXIS 14476, at *4 (N.D. Ill. Sept. 10, 1998) ("[T]he Seventh Circuit has provided a one-year grace period in applying § 2244(d)(1)"); *see also United States ex rel. Martinez v. DeTella*, No. 97 C

the Seventh Circuit's decision in this case that the statute of limitations begins to run on April 24, 1996. (Ptn. 8-9.) That is not so. Although the Seventh Circuit in *Lindh* expressly prohibited dismissal under Section 2244(d) of a collateral attack filed by April 23, 1997, it did not hold that any collateral attack filed after April 23, 1997 *must* be dismissed.

Furthermore, the Seventh Circuit did not address in *Lindh* whether the one-year "reasonable time" period it borrowed from Section 2244(d) included with it the exemption for pending state post-conviction proceedings that Congress placed in 28 U.S.C. § 2244(d)(2).

The State's argument is flawed because it fails to take the context of the Seventh Circuit's original *Lindh* holding into account. In *Lindh*, the Seventh Circuit held that the AEDPA was to be given retroactive effect. 96 F.3d at 865. The court therefore had to create, essentially out of whole cloth, what the State calls the "grace period" to save that statute. As the Seventh Circuit correctly noted in its *Lindh* decision:

> A prisoner's decision to defer filing -- perhaps while doing legal research, or while waiting for the Supreme Court to decide a case that could influence the selection of issues -- is the sort of event to which the amended statute would 'attach new legal consequences.'

Id. After this Court reversed the Seventh Circuit's retroactivity conclusion, however, the so-called "grace period" would only

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3319, 1997 U.S. Dist. LEXIS 16524, at *3-*4 (N.D. Ill. Oct. 16, 1997) ("In *Lindh*, the court created a one-year 'grace period' for habeas petitioners whose claims would otherwise be foreclosed by the terms of the Act."). The Seventh Circuit, however, did not use the term "grace period."

be necessary if a court interpreted the Section 2244(d) one year period to have retroactive effect, so that a would-be petitioner could find himself barred by Section 2244(d) on the day it became effective.

Another problem that disappears with the *Gendron/Glass* approach is the confusing interplay between the judicially-created "grace period" and Congress's Section 2244(d) statute of limitations. Certainly the better result is to give Section 2244(d) a prospective reading, as the Seventh Circuit has done here and as the Tenth Circuit plainly did in *Hoggro v. Boone*, 150 F.3d 1223, 1225-26 (10th Cir. 1998).[2/] This eliminates the need for engrafting onto the statute a judicially-drafted "grace period," and further eliminates the need for analyzing confusing -- and unnecessary -- issues about the interrelationship between the so-called "grace period" and the actual statute of limitations provided by Congress in Section 2244(d), including the Section 2244(d)(2) tolling provision.

Furthermore, the Seventh Circuit's prospective reading of Section 2244(d) most likely comports with Congress's intent. If Congress had wanted a "grace period," it could have created one; the fact that Congress did not strongly suggests either that it intended that courts would apply the one year period prospectively only, or that it simply did not think of the

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2/ Contrary to the State's argument, the Tenth Circuit's conclusion in *Hoggro* is not inconsistent with that court's earlier holding in *United States v. Simmonds*, 111 F.3d 737 (10th Cir. 1997). (Ptn. 9 n.4.) In *Simmonds*, the court held that the one year limitations period of Section 2255 constituted a reasonable time for prisoners to bring Section 2255 motions. *See id.* at 746. *Simmonds* did not address the salient issue in *Hoggro* - the relationship between a Section 2254 habeas petition and the limitation period/tolling provision of Section 2244(d).

problem. (As this Court said in *Lindh*, "[a]ll we can say is that in a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting." 117 S. Ct. at 2068.) In either event, the simple expedient of using the statute of limitations that Congress provided in Section 2244(d) prospectively will guarantee that no one is deprived retrospectively of time to file their petition, while avoiding a gaggle of problems caused by interjecting a judge-made "grace period" into a well-defined limitations/tolling statute.

The State contends that if the statute of limitations provided for in 28 U.S.C. § 2244(d)(1)(A) had been determined to begin on April 24, 1996, there would have been no need for the Seventh Circuit and other courts like *Burns v. Morton*, 134 F.3d 109 (3d Cir. 1998); *United States v. Flores*, 135 F.3d 1000 (5th Cir. 1998); *Brown v. Angelone*, 150 F.3d 370 (4th Cir. 1998); *Ross v. Artuz*, 150 F.3d 97 (2d Cir. 1998); and *United States v. Simmonds*, 111 F.3d 737 (10th Cir. 1997), to have adopted a grace period at all. (Ptn. 9.) In *Burns*, the Third Circuit, like the Seventh Circuit in *Lindh*, did not state that it was adopting a "grace period." It simply held that to avoid impermissible retroactive application of the AEDPA, "habeas petitions filed on or before April 23, 1997, may not be dismissed for failure to comply with § 2244(d)(1)'s time limit." 134 F.3d at 111. The *Burns* case, like *Lindh* and the other cases cited by the State, did not require the court to address the specific issue raised in this case because the petitioner had filed his petition *before* April 23, 1997. Only *Calderon v. United States Dist. Court*, 128 F.3d 1283 (9th Cir. 1997), is different. In *Calderon*, the petitioner filed his petition after April 23, 1998, but did not have pending state post-conviction proceedings to toll the statute. The court in *Calderon*

nevertheless equitably tolled the statute of limitations because the petitioner's attorney had withdrawn. *See id.* at 1289. The *Calderon* court concluded, as did the Seventh Circuit in the underlying decision, that the "AEDPA's one-year time limit did not begin to run against any state prisoner prior to the statute's date of enactment." *Id.* at 1287. As a statute of limitations, the *Calderon* court held that the Section 2244(d) one year period was presumptively subject to equitable tolling. *See id.* at 1289.

Mr. Glass's case, however, required the Seventh Circuit to discern the difference between the so-called "grace period" and the actual statute of limitations, and to address how the statute works. Because Mr. Glass had a proper post-conviction petition pending in the Illinois courts when the AEDPA was enacted, the tolling provision of 28 U.S.C. § 2244(d)(2) applied. The AEDPA does not expressly provide an exception to the tolling provision in 28 U.S.C. § 2244(d)(2) for cases in which the judgment of conviction became final before April 24, 1996, and the State advances no argument why the courts should create one.

To the contrary, as would-be habeas petitioners whose state post-conviction proceedings have extended from before to after the effective date of the AEDPA turn to the habeas statute to assess when to file -- and many, like Mr. Glass, will do so pro se -- it will not be clear to them that this new statute counts against them the time that passed before Congress enacted it. For that reason as well, the Seventh Circuit's ruling in this case provides the proper approach to this statute: "[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). *See also Kolender v. Lawson*, 461 U.S. 352, 357-58

(1983) (describing the necessity of statutory definiteness so not to encourage arbitrary and discriminatory enforcement and so ordinary people can understand what conduct is prohibited). Further, fair notice:

> obviously carries great import when limiting the time afforded a prisoner to seek a writ of habeas corpus, the 'fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action.'

Brown v. Angelone, 150 F.3d 370, 375 (4th Cir. 1998) citing *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969).

The Seventh Circuit's decision in the case at bar is not inconsistent with the holdings in any other Seventh Circuit decision. Both *O'Connor v. United States*, 133 F.3d 548 (7th Cir. 1998), and *Young v. United States*, 124 F.3d 794 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 2324 (1998), involved a petition filed within one year after the AEDPA became effective. Furthermore, both of these cases arose in the context of 28 U.S.C. § 2255, a context that obviously presented no issues of how to treat time that elapses during state post-conviction proceedings. Consequently, if the petitioners in *O'Connor* and *Young* had not filed by April 23, 1997, their petitions would have been barred because the statute of limitations for proceedings in 28 U.S.C. § 2255 does not contain any tolling provision. *See Hoggro*, 150 F.3d at 1226. In Section 2254 cases, unlike Section 2255 cases, the statute of limitations provided by Congress will differ from the judicial *Lindh* "reasonable time" rules because "Congress has explicitly instructed the federal courts - through § 2244(d)(2) - to toll time spent in state court." *Hoggro*, 150 F.3d at 1226.

The State maintains that the proper analysis of this issue is found in the cases *Brown v. Angelone*, 150 F.3d 370 (4th Cir. 1998), and *United States v. Flores*, 135 F.3d 1000 (5th Cir. 1998). (Ptn. 11.) Contrary to the State's contention, neither of these cases employed a "grace period." Instead, they followed *Lindh's* reasoning in holding that one year after the AEDPA's effective date was a reasonable period within which petitioners may file. *See Brown*, 150 F.3d at 374-76; *Flores*, 135 F.3d at 1005-06. It is entirely consistent that the "reasonable time," or "reasonable period" adopted by these courts, which coalesces with the statutory period of one year, *Brown*, 150 F.3d at 375, be subject to the tolling provision set forth in Section 2244(d)(2).

At least three courts of appeals have held that Section 2244(d)(1) is not a jurisdictional bar, but a statute of limitations that begins to run on the date of the statute's enactment and is subject to equitable tolling. *See Miller v. New Jersey State Dep't of Corrections*, 145 F.3d 616, 617-18 (3d Cir. 1998); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998), *cert. denied*, 119 S. Ct. 210 (1998); *Calderon*, 128 F.3d 1283, 1287-89 (9th Cir. 1997). Although none of the petitioners in those cases had pending state post-conviction proceedings, a logical extension of equitable tolling is the application of the statutory tolling period to the appropriate case. If courts have been willing to find that Congress intended the one year period to function as a statute of limitations, subject to equitable tolling, than surely the same statute of limitations should be subject to Congress's explicit instructions that:

> The time during which a properly filed application for state post-conviction or other collateral review . . . shall

not be counted toward *any period of limitation* under this subsection.

28 U.S.C. § 2244(d)(2) (emphasis added).

Given that the exhaustion requirement of 28 U.S.C. § 2254(b)(1)(A) remains unchanged by the AEDPA amendments, principles of comity and judicial economy support the Seventh Circuit's interpretation of the statute of limitations in 28 U.S.C. § 2244(d)(1). It simply makes no sense, as a district court on the front lines opined, "to adopt an interpretation of the AEDPA that would require a petitioner to file a § 2254 petition before he exhausted his state remedies." *United States ex rel. Morgan v. Gilmore*, 97 C 4771, 1998 U.S. Dist. LEXIS 9845, at *6 (N.D. Ill. June 24, 1998). The federal district courts should not have to take habeas cases on their dockets while the state courts are still adjudicating post-conviction proceedings, and the state courts should be free to adjudicate them without federal courts exercising habeas jurisdiction at the same time. Thus, the Seventh Circuit's decision in this case reinforces the necessary and compatible interaction between the state courts and federal courts.

At the conclusion of its brief, the State poses an example that supposedly demonstrates "where unfair results would ensue" under the Seventh Circuit's ruling in this case. (Ptn. 14.) After reading the example, however, one is left to wonder how, and to whom, the Seventh Circuit's ruling could be unfair.[3/] The six month difference in that example is not long

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3/ If the comparison intended is between persons who fall strictly under "the limitations period formulation recognized by the Seventh Circuit in *O'Connor* and *Lindh*" (Ptn. 14) and those who would fall under the rule in this case, the difference is dictated by two facts: (1) the federal offenders

enough to be unfair in and of itself. Indeed, before the enactment of the AEDPA petitioners could and often did wait years before filing their habeas petitions, and even though finality was not well served, "fairness" was seldom implicated. When a petitioner's delay causes unfairness to the State in the adjudication of the merits, the habeas court will have discretion to address the fairness issue. *See Lonchar v. Thomas*, 517 U.S. 314, 326-30 (1996) (holding that although ad hoc equitable rulings are generally inappropriate, Rule 9(a) of the Rules Governing § 2254 cases in the United States District Courts provides a ground for dismissal of delayed petitions if the state has been prejudiced in its ability to respond to the petition); *see also Buchanon v. Mintzes*, 734 F.2d 274, 280 (6th Cir. 1984), *cert. granted*, 469 U.S. 1033 (1984), *and cert. dismissed*, 471 U.S. 154 (1985) (finding that a twenty-five year delay before filing a habeas petition prejudiced the state under Rule 9(a) for several of petitioner's claims due to loss of memory, potential witnesses, and records). In the meantime, states concerned about the length of time that post-conviction proceedings pend can take steps to expedite those proceedings, as Illinois has done. *See, e.g.*, 725 ILCS 5/122-1(c) (limiting time for filing post-conviction petition); 5/122-2.1(a) (directing examination of petition by court within 90 days); 5/122-5 (limiting time for filing responsive motions and pleadings).

Recognizing April 24, 1996, as the starting point for the statutory limitations period has several advantages over the State's insistence upon an extended "grace period" for certain cases. This decision is fair. It allows all petitioners, whether

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who would fall under *O'Connor* have no other post-conviction proceedings to pursue and (2) Congress wisely mandated tolling for state prisoners during the pendency of their state post-conviction proceedings.

their conviction became final before or after the enactment of the AEDPA, one full year to file a habeas petition, tolling the time spent during state post-conviction proceedings, as Congress deemed appropriate. Courts can also apply this rule easily. It is undetermined what factors would influence a court to toll the statutory period for some situations; an ad hoc determination by courts could never be applied as evenly as starting the limitations period on April 24, 1996. Finally, if courts had to review whether the "grace period" should be equitably tolled, much time and effort would be spent determining the circumstances of each case and deciding whether the period should be tolled.

CONCLUSION

For these reasons, Petitioner James P. Glass respectfully suggests that this Honorable Court deny the Petition for Writ of Certiorari.

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Respectfully submitted,

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